Klein v Kessler
2013 NY Slip Op 31276(U)
June 12, 2013
Sup Ct, Suffolk County
Docket Number: 09-2082
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 09-2082
CAL. No. 11-02129EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-15-12
ADJ. DATE 03-05-13
Mot. Seq. # 001 - MotD

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MIRIAM KLEIN and FRANCINE DREYFUS,

Plaintiffs,

- against -

WARREN C. KESSLER, MARIE KESSLER, CRAIG W. KESSLER and KAREN R. KESSLER,

Defendants.

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22 - 29 ; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the portions of the motion which seek an order adjudging that plaintiffs' property is benefitted by the roadway easement over defendants' properties and barring and enjoining defendants from directly or indirectly interfering with plaintiffs' access to and over those portions of defendants' properties encumbered by the roadway easement are granted; and, it is further

ORDERED that the portions of the motions which seek an order adjudging and determining that plaintiffs' property is benefitted by an easement to the bay over defendants' property, barring and enjoining defendants from directly or indirectly interfering with plaintiffs' access to and over those portions of defendants' properties encumbered by the bay easement, including plaintiffs' right to clear the easement for year-round access, granting plaintiffs a permanent injunction against defendants' interference with the easement to the bay, and dismissing defendants' affirmative defense regarding the statute of limitations and their counterclaim for adverse possession are granted; and it is further

ORDERED that the remaining requests are otherwise denied.

The plaintiffs commenced this action against defendants Warren C. Kessler, Marie Kessler ("the Sr. Kesslers"), Craig W. Kessler and Karen R. Kessler ("the Jr. Kesslers") in or about January 2009 seeking a determination that certain easements over defendants' properties benefit plaintiffs' property, and barring and enjoining defendants from disturbing or interfering with plaintiffs' access over the portion of the property encumbered by the said easements pursuant to RPAPL Article 15. In their answer, defendants interpose a counterclaim against plaintiffs seeking a determination pursuant to RPAPL Article 15 that plaintiffs be barred from all claims over the properties described particularly in their counterclaim (*i.e.* the easement areas) and that sole and complete ownership and possession of those properties be awarded to defendants through adverse possession. (The counterclaim does not indicate the specific time period over which adverse possession is claimed but states that "all such claims [of plaintiffs] have been wholly and effectually extinguished, cut off, and barred by acts or occurrences of a continuing nature that have continued for a period exceeding that required by statute for the extinguishment of such claims through adverse possession, and the Defendants are seized and possessed of the subject parcels of property free of, and wholly discharged from, any and all claims, easements, or encumberances [*sic*].")

Plaintiffs request the court to grant summary judgment adjudging and finally determining that plaintiffs' property is benefitted by easements over defendants' properties, barring and enjoining defendants from directly or indirectly interfering with plaintiffs' access to and over those portions of defendants' properties encumbered by said easements, including plaintiffs' right to clear the easement for year-round access and to provide for and maintain direct access to the Peconic Bay at the waterfront which has a bulk head, through the installation of a ladder, and dismissing defendants' affirmative defense of statute of limitations and defendants' counterclaim for adverse possession. In support of the motion they include, *inter alia*, copies of the pleadings, deeds, surveys, an agreement dated February 13, 1964, and deposition transcripts of the parties as well as non-parties Allen Smith, Andrew Toscano, Noreen Kelly Toscano, John Reeve, and Sandra J. Reeve. Defendants oppose the motion and include, *inter alia*, a survey dated November 5, 1998 for W & M Associates and Warren and Marie Kessler, a survey dated October 8, 1969 for Isadore J. And Irene J. Pendzick, and an affidavit of defendant Warren Kessler, as well as the pleadings.

The plaintiffs acquired title, through a bargain and sale deed, to a property known as 55 Jacobs Place[1] on November 16, 2007 from Andrew Toscano and Noreen Toscano. The deed contained two non-exclusive easements, one a 33 foot wide "roadway" from Peconic Bay Boulevard running south over approximately 1200 feet to the "southerly terminus of the 33 foot roadway" ("the roadway easement"). The second "non-exclusive easement for ingress and egress over and upon a certain right of way, 25 feet wide, leading over other lands of the trustee to Peconic Bay" ("the bay easement") generally ran along the northern boundary line and then the eastern boundary line of the property now owned by the Jr. Kesslers. This property adjoining the bay easement, commonly known as 100 Jacobs Place, was acquired by W & M Associates (of which the Sr. Kesslers were the principals) in 1983. On August 16,

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[1]Within the various deeds, surveys, and agreement Jacobs Place has also been referred to as Jacobs Road, Jacobs Path, and Jacob's Place. All refer to the same parcels.

2005 this property was transferred by deed from W & M Associates to the Sr. Kesslers and then transferred by deed from them to the Jr. Kesslers. The deed to the Jr. Kesslers specifically states in the description of the property that it is "SUBJECT to the rights of others for ingress & egress over a 33 foot wide R.O.W., known as Jacob's Place ..."

It is undisputed that the easements were created by virtue of several instruments including a deed dated July 31, 1965 (the Estate of Cecil Jacobs and Nellie Jacobs DeWitt to Shapiro) and an Agreement dated February 13, 1964 by and between Laurence E. Hulse, Nell F. Jacobs DeWitt, John G. Crandall, Raymond Young and Kristine Young, and Edward J. Zebroski and Elizabeth H. K. Zebroski. In describing the bay easement, the deed states that it is "an easement for ingress and egress over and upon a certain right-of -way, 25 feet wide, leading over other lands of the Trustee to Peconic Bay" and within the metes and bounds description it indicates that it runs south "to Peconic Bay, as marked by a bulkhead."

With regard to the roadway easement, defendants admit in their opposition papers that "[t]here is not now nor has there [ever] been an issue as to the existence of this right-of-way or as to the rights of any of the parties to use the right-of-way for ingress and egress to and from Peconic Bay Boulevard." However, they argue that the bay easement was extinguished by adverse possession. In his affidavit in opposition to this motion, defendant Warren Kessler states that when he and his wife purchased the property in 1983 they were shown a survey dated in 1969 which indicated that there was a right-of-way along the northern and eastern boundaries of the property. Two small buildings existed within the boundaries of the right-of-way in 1983 in the same location as was depicted on the survey. Defendant Kessler maintains that the right-of-way "was completely wooded and overgrown with bushes, vines, briars, and other natural vegetation." He avers that the condition of the right-of-way remained the same until the present time, except that it had become more overgrown with natural vegetation. He stated further that "there have been several occasions during our ownership of this property when certain neighbors in the area have demanded that the right-of-way be opened and cleared so it could be used for access to the bay. On each of [those] occasions, my wife and I have adamantly opposed and prevented the opening of the right-of-way." He indicates that in 1989 he was approached by a previous owner of plaintiffs' property, Mr. Spanburgh, who wanted to clear the right-of-way to use it for access to Peconic Bay but that he refused to allow him to do so, and that the controversy between the two continued during the entire time Mr. Spanburgh owned the property until it was sold in or about 2001 to the Toscanos (who sold the property to plaintiffs). Defendant Warren Kessler testified during his examination before trial that when he first acquired the property he was aware of the right-of-way to the bay, that he was aware that it was contained in the deed of plaintiffs and some other property owners, that he does not remember when he came to believe that it was not a valid right-of-way, that he does not remember if he disputed anyone's right to use the right-of-way when he first acquired the property, and that he knew that the right-of-way was in plaintiffs' deed "but that [he has] consistently denied access to the right-of-way ... since [he] owned the property ... several people [had] asked, and [he had] refused" since 1983.

The testimony of the parties and the non-party witnesses make clear that except for defendants, each averred that they have walked the right-of-way to the bay throughout the time period that defendants owned same. Defendants each testified that they never saw anyone walk it during their

ownership of the property.[2] However, defendants admitted that they never posted any signs upon the property indicating "no trespassing", "get out", etc., nor did they fence in the area. Defendant Marie Kessler admitted showing the Toscanos where the right-of-way was located but that she expressed disagreement with them as to whether they had the right to use it.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

With respect to adverse possession, in July 2008, Real Property Actions and Proceedings Law §§ 501, 522, and 543 were amended and the amendments applied solely to those actions commenced after July 7, 2008 (*see* ***Asher v Borenstein***, 76 AD3d 984, 986, 908 NYS2d 90 [2d Dept 2010]). However, the 2008 amendments are not applicable where the property rights under an adverse possession claim vested prior to the 2008 enactment of the amendments (***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; *see* ***Sprotte v Fahey***, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]). Under the law as it existed prior to July 7, 2008, where a claim of adverse possession was not based upon a written document, the plaintiffs had to demonstrate that the disputed parcel was "usually cultivated or improved" or "protected by a substantial inclosure" (*see* ***Bratone v Conforti-Brown***, 79 AD3d 955, 913 NYS2d 762 [2d Dept 2010]; Real Property Actions and Proceedings Law former § 522 [1], [2], *cf.* L 2008, ch 269, § 5, as amended). In addition, the plaintiffs had to prove by clear and convincing evidence the following common-law requirements of adverse possession: that (1) the possession was hostile and under claim of right; (2) it was actual; (3) it was open and notorious; (4) it was exclusive; and (5) it was continuous for the statutory period of 10 years (*see* ***BTJ Realty, Inc. v Caradonna***, 65 AD3d 657, 658, 885 NYS2d 308 [2d Dept 2009]; ***Goldschmidt v Ford St.***, *LLC*, 58 AD3d 803, 804-805, 872 NYS2d 493 [2d Dept 2009]).

Following the 2008 amendments to the RPAPL, in order to gain title by adverse possession the occupancy of the property must be, *inter alia*, "under a claim of right ... [which] means a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL §501 [2] and [3]). Additionally, the amendments to RPAPL indicate that adverse possession is established "[w]here there

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[2]The Sr. Kesslers purchased the property in 1983 but did not reside there until 1990.

have been acts sufficiently open to put a reasonably diligent owner on notice" or "[w]here [land] has been protected by a substantial enclosure" (RPAPL §522). However, "[a]n awareness that others own the property within the statutory 10-year period will defeat any claim of right," so that the necessary elements for a claim of adverse possession would not be established (***D'Argenio v Ashland Building, LLC***, 78 AD3d 758, 758-759, 910 NYS2d 550 [2d Dept 2010]).

Since adverse possession is disfavored as a means of gaining title to land, all elements of an adverse possession claim must be proved by clear and convincing evidence (*see* ***Best & Co. Haircutters, Ltd. v Semon***, 81 AD3d 766, 916 NYS2d 632 [2d Dept 2011]).

In determining the extent of an easement, the language contained in the grant is generally dispositive (***Starcic v Hardy***, 31 AD3d 630, 818 NYS2d 602 [2d Dept 2006]). However, it is sometimes necessary to consider the circumstances which would manifest the intent of the parties in granting the easement to determine its scope (*see* ***Leaman v McNamee***, 58 AD3d 918, 870 NYS2d 612 [3rd Dept 2009]).

Defendants have admitted that there is no dispute with regard to the validity of the roadway easement. Thus, the portion of plaintiffs' motion which requests an order adjudging that plaintiffs' property is benefitted by the roadway easement over defendants' properties and barring and enjoining defendants from directly or indirectly interfering with plaintiffs' access to and over those portions of defendants' properties encumbered by the roadway easement, is granted.

Here, where defendants allege that the bay easement was acquired by them through adverse possession, they have failed to show same by clear and convincing evidence. Nowhere do defendants indicate exactly when title by adverse possession was established. Defendant Warren Kessler indicates that he believed that the right-of-way was abandoned at the time he took title but had testified that he did not recall when he came to believe that the right-of-way was no longer valid. Thus, if defendants are claiming that they acquired title by adverse possession prior to 2008, when the RPAPL was amended, they would have to show that they usually cultivated or improved the right-of-way or protected it by a substantial inclosure (***Bratone v Conforti-Brown***, *supra*). As was indicated by the testimony of all defendants as well as the affidavit of defendant Warren Kessler, the right-of-way was neither cultivated or improved, nor was it fenced off or enclosed in any way. In fact, Warren Kessler declared that it became more overgrown over time. In the event that defendants are claiming that the adverse possession was complete after the 2008 amendments to the RPAPL, they would have to show that they possessed the property under a claim of right, which is defeated by an awareness that others own the property (RPAPL §501 [2] and [3]; ***D'Argenio v Ashland Building, LLC***, *supra*). Again, the testimony of the Kessler defendants indicate that they were aware of and knew that plaintiffs, their predecessors in title, as well as other neighbors, claimed that they had a valid right-of-way to the Peconic Bay throughout defendants' ownership of the property and knew that the right-of-way was in their deeds. Defendants have failed to establish by clear and convincing evidence that they acquired title by adverse possession to the right-of-way to the bay as contained in plaintiffs' deed. Accordingly, the portions of plaintiffs' motion for summary judgment adjudging and determining that their property is benefitted by an easement to the bay over defendants' property, barring and enjoining defendants from directly or indirectly interfering with plaintiffs' access to and over those portions of defendants' properties

encumbered by the bay easement, including plaintiffs' right to clear the easement for year-round access, granting plaintiffs a permanent injunction against defendants' interference with the easement to the bay, and dismissing defendants' affirmative defense regarding the statute of limitations and their counterclaim for adverse possession are granted.

The remaining portions of plaintiffs' motion are denied, including the request to provide for and maintain direct access to the Peconic Bay at the waterfront through the installation of a ladder at the bulkhead. The evidence provided is not sufficient to show the intent of the parties in connection with the scope of the easement insofar as entering or exiting the bay at the bulkhead, thus at this time, the Court cannot determine whether the installation of a ladder at the bulkhead was an intended use of the easement (*see* ***Leaman v McNamee***, *supra*).

Dated: June 12, 2013

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**